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Paul L. Sayre

Indiana University School of Law

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SYMPOSIUM: INDIANA DECISIONS, 1927-28

PAUL L. SAYRE.

The Student Board of Editors voted not to publish the usual *Recent Case Notes* in this issue of the JOURNAL. It decided instead to print a brief symposium of the comments that have appeared during the past year in other legal periodicals of the country in which Indiana cases have been considered and critically analyzed.¹ The Student Editors felt it would be best to set forth only what other legal periodicals have said about Indiana decisions, with footnote references to cases that have also been discussed in our JOURNAL. The writer has had the privilege of association with the Student Editors in the editorial work of the JOURNAL. They requested him to present this symposium on their behalf. In trying to carry out this plan it must be understood that he attempts to do no more than to present the opinions of others without any discussion of his own, and with the consciousness that only a reading of the comments themselves will give a full understanding of the position which Indiana cases have held during the past year as indicated by professional comments in these periodicals of national standing.

In going over legal publications in America for the year 1927-28, it appears that there have been twenty-four critical comments upon Indiana cases decided during this year. Roughly speaking, it seems fair to say that the decisions in New York have been more frequently the subject of comment in legal periodicals than Indiana decisions. On the other hand, it may be said that Indiana cases have been discussed about as much as cases arising in the other states. The comments here considered indicate that Indiana decisions have been as often praised as the decisions in other states, while adverse criticism has been about as frequent in our case as in the case of others. In sub-

¹ This paper deals only with Indiana cases decided by the Supreme or Appellate courts during the year 1927-28, in so far as these decisions in turn have been the subject of comments in legal periodicals during the same period. More accurately it should be said that both the Indiana decisions and the comments discussing them begin with January 1, 1927, and continue until June 1, 1928. The legal periodicals for the month of June, 1928, were not available at the time this paper was written; hence comments dealing with Indiana cases that may appear in the issues for June, 1928, are not considered here.

mitting a symposium of these comments, it is difficult to fix upon an order of presentation which will be helpful to the reader. The cases do not group themselves conveniently under any of the usual legal classifications as to subject matter, and a presentation according to the date when the case was decided, or the periodical in which the criticism appeared would not be helpful. The writer ventures, therefore, to list them in alphabetical order according to the names of the decided cases, so that reference to the several cases will thus be facilitated and the comments in all periodicals that discussed a particular case will appear together.

BEARSS v. CORBETT

The case of *Bearss v. Corbett* has been commented upon in the *Harvard*,² *Minnesota*,³ and *Pennsylvania*⁴ *Law Reviews*. In this case one Pierce provided by deed that certain land should go to his wife for life, then to his daughter for life, then to the children of the latter. Before the birth of the plaintiff, her mother, the second life tenant, brought an action to quiet her title to the land. She joined as defendant the plaintiff's half-brother who, being six years old, was represented by a guardian *ad litem*. The court decreed that the plaintiff's mother owned the land in fee simple. By *mesne* conveyances the land passed from her to the defendants. The plaintiff, alleging that she was not bound by the former decree, which was admittedly erroneous, brought an action to quiet her title to the land. From a judgment sustaining the demurrers of the defendants, the plaintiff appealed. *Held*, that the plaintiff is bound by the former decree under the rule of virtual representation.⁵

The *Harvard Law Review* Comment and the *Minnesota Law Review* comment approved the result of the case and the reasoning presented by the court in its opinion on the ground that the doctrine of virtual representation is well established in the law and that it applies for the purpose of terminating a contingent remainder where the contingent remainder thus determined is represented by a like interest in the litigation itself.⁶ It is

² 41 *Harv. L. Rev.* 543. This case is also commented upon in 3 *Ind. L. Jour.* 400.

³ 12 *Minn. Law Rev.* 664.

⁴ 76 *Pa. L. Rev.* 462.

⁵ *Bearss v. Corbett*, 158 N. E. 299 (Ind. App. 1927). Comments that are here discussed on this case appeared in 41 *Harv. L. Rev.* 543.

⁶ *Tonnele v. Wetmore*, 195 N. Y. 436, 88 N. E. 1068 (1909); *Buchan v. German-American Land Co.*, 180 Ia. 911, 164 N. W. 119 (1917).

pointed out that the rule is alleviated at least under the Torrens System, which provides a fund to compensate those who are injured by the doctrine of virtual representation as applied in connection with the settling of title under the Torrens Act.⁷ If it be said that this doctrine enables the court to take property without due process of law, it is answered that the doctrine of virtual representation applies only where the representation is fair and where there is a real necessity for its application.⁸ The theory of necessity is based upon considerations analogous to those quieting title in equity. It is felt that property rights must be vested to the advantage of the living and that the interests of the afterborn should not preclude such final vesting of property interests in the living where the afterborn are adequately represented by those having similar if not identical interests in the litigation itself. The *Pennsylvania Law Review* stresses the point that the doctrine of virtual representation should not apply in the case of cutting off contingent remainders unless there is a real necessity for its use in the disposition of present interests. Thus it is said that there is no objection to the use of virtual representation where property is changed from personalty into realty or where the purpose is to destroy some claim adverse to the paramount title, but that it is a different question where contingent remainders, valid under the original conveyance, are to be cut off when the remainderman himself is not a party to the suit.⁹ The *Pennsylvania* commentator also deplores the *Bearss* case on the ground that it has extended the doctrine of virtual representation from the limited field of cutting off contingent remainders upon the ground of strict necessity to the more hazy ground of general convenience, regardless of real interests of the contingent remainderman himself.¹⁰ The case of *Bearss v. Corbett* is difficult to determine on the facts since the former decree of the court vesting the fee simple title in the plaintiff was admittedly erroneous. There was no appeal from that decree and it was binding on all par-

⁷ *Drake v. Frazer*, 105 Neb. 162, 179 N. W. 393 (1920).

⁸ *Loring v. Hildreth*, 170 Mass. 328, 329, 49 N. E. 652, 653 (1898).

⁹ "However, in a case like *Bearss v. Corbett*, where the doctrine is applied to cut off the rights of the contingent remainderman, rather than to change them into another form, and to enlarge the estate of the fee tenant into a fee simple, it would seem that the reason of the rule has been overlooked." 76 *Pa. L. Rev.* 463.

¹⁰ *Johnson v. Jacob*, 74 Ky. 646 (1876). *Contra: Hopkins v. Patton*, 257 Ill. 346, 100 N. E. 992 (1913). But see *Downey v. Seib*, 185 N. Y. 427, 78 N. E. 66 (1906).

ties involved unless it could be attacked collaterally. Thus it was a hard case for the application of the rule of virtual representation, inasmuch as admittedly there had been an erroneous decision in the suit in which the virtual representation was held to be binding.

DURHAM v. STATE

In *Durham v. State*, the defendant, a deputy game warden, arrested B for committing a misdemeanor in violating the fish and game law. B resisted arrest and, while attempting to escape in a boat, struck the defendant with an oar, whereupon the defendant shot and wounded him. The defendant was tried and convicted of assault and battery. The trial court instructed the jury that the defendant would not be authorized to use such force and instrumentalities as would imperil the life of B, in order to overcome his resistance. On appeal it was *held*, that the trial court erred in omitting to instruct the jury that the defendant was not obliged to retreat when forcibly resisted, but might use reasonable force to effect the arrest, and if threatened with death or serious injury he would be justified in wounding or taking the life of the misdemeanor, in self-defense.¹¹

The *Minnesota Law Review*¹² points out that it is generally held that an officer in making a lawful arrest of a misdemeanor may use such force as is reasonably necessary to effect the arrest. The commentator states that the Indiana decision in the *Durham* case is in keeping with the majority rule which holds that an officer in making a lawful arrest of a misdemeanor may use such force as is reasonably necessary to overcome any forcible resistance made by the misdemeanor, even to the extent of taking his life.¹³ The minority rule on this subject limits the right of an officer to use such force, extending to the taking of life, to situations where the officer is put in reasonable apprehension of immediate death or great bodily harm by the nature of misdemeanor's resistance.¹⁴ But it has been held further that even under the latter rule the officer has no duty to retreat in order to avoid such a situation.¹⁵ Thus the Minne-

¹¹ *Durham v. State*, 159 N. E. 145 (Ind., 1927).

¹² 12 *Minn. L. Rev.* 539. This case is also commented upon in 3 *Ind. L. Jour.* 242.

¹³ *Commonwealth v. Marcum*, 135 Ky. 1, 122 S. W. 515 (1909); *Kreuger v. State*, 171 Wisc. 566, 177 N. W. 917 (1920).

sota commentator approves the result of the *Durham* case since he finds there is no significant difference between the majority and minority rules in their application. "Where the reasonable force rule is applied, the taking of a misdemeanor's life will ordinarily be found to be reasonable only where the officer was in reasonable apprehension of immediate death or great bodily injury, so it may be said that in effect both rules are substantially the same."¹⁶

FAIR BLDG. CO. v. WINEMAN REALTY CO.

In the case of *Fair Bldg. Co. v. Wineman Realty Co.*, A and B were adjoining land-owners. A covenanted for himself and assigns to pay one-half the value of a party wall to be erected by B whenever the wall should be utilized by A or his successors. A assigned the reversion to the defendant in error and the term to the plaintiff in error. The wall was used and in an action by the reversioner against the tenant to be saved harmless in accordance with a covenant in the lease, judgment was entered in favor of the reversioner. *Held*, on appeal, that the judgment be affirmed since the party wall agreement was a covenant running with the land, cross-easements of support having been created.¹⁷

The *Yale Law Journal*¹⁸ commentator in discussing this case states briefly that there are three theories with respect to the enforceability of promises to pay for a proportionate part of a party wall where the promisor is not asked to make the payment himself, but the payment is demanded of a subsequent alienee. One view, which is adopted in the instant case, is that immediately upon the building of the wall, each party owns that portion situated on his land and the covenant operates to convey cross-easements of support, commonly called reciprocal easements.¹⁹ This theory supplies the "privity of estate" which can be used to bind a later alienee. It is considered that the promise to pay restricts the original non-builder's privi-

¹⁴ *Thomas v. Kinkad*, 55 Ark. 502, 18 S. W. 854, 15 L. R. A. 558, 29 Am. St. Rep. 68 (1892).

¹⁵ *State v. Smith*, 127 Ia. 534, 103 N. W. 944, 70 L. R. A. 264, 4 Ann. Cas. 758 and note (1894).

¹⁶ 12 Minn. L. Rev. 540.

¹⁷ *Fair Bldg. Co. v. Wineman Realty Co.*, 156 N. E. 433 (Ind., 1927).

¹⁸ 37 Yale L. Jour. 126.

¹⁹ *Kim. v. Griwn*, 67 Minn. 25, 69 N. W. 634 (1896); Jones, *Easements* (1898), sec. 632; Sims, *Covenants* (1901), 198 et seq.

lege of user and thereby affects his legal relations with respect to the land. Hence it is said under this theory that the burden "touches and concerns" the land. So it may be said also that the benefit runs, since the builder's right to reimbursement matures only upon his later sustaining the additional burden of support caused by the non-builder's utilization of the party wall for his own building. Some courts, however, refuse to give the cross-easement this effect and, therefore, hold that only a debtor-creditor relationship exists; consequently both the benefit and the burden are "personal and do not run."²⁰ The same result as that reached by the Indiana court in the instant case is reached in perhaps a majority of American jurisdictions under a different theory. These states hold that a builder owns the entire wall, having been granted an easement of support by the nonbuilder, the latter having a power to acquire ownership of the half of his land.²¹ Both the benefit and burden would clearly run under such a theory. The Yale commentator suggests that the only serious objection to either the first or the third theory is that they might be subject to the rule against perpetuities. He concludes that American courts that follow either theory are right in holding that it is not subject to the rule against perpetuities.²² It must be conceded generally, that the rule against perpetuities should not be applied in any case unless there is a strong reason in public policy for its use. Thus the rule against perpetuities is rightly considered not to apply to covenants running with the land, just as it does not apply to rights of entry, rights of reverter, and rights of renewal of leases, and options to purchase in America.

FOUNTAIN PARK CO. v. HENSLER.

The *Yale Law Journal*²³ comments upon the case of *Fountain Park Co. v. Hensler*, involving a difficult and important question in the law of eminent domain. Unfortunately no law review during the past year has commented upon the later Indiana case of *Kessler v. City of Indianapolis* which involves much the same issue and which has been the subject of consider-

²⁰ *Gibson v. Holden*, 115 Ill. 199, 3 N. E. 282 (1885).

²¹ *Jones v. Monroe*, 285 S. W. 1055 (Tex. Com. App. 1926); *Berry v. Godfrey*, 198 Mass. 228, 84 N. E. 304 (1908); Aigler, *Agreements to Pay For Party Walls* (1911), 10 Mich. L. Rev. 187.

²² Gray, *Rules Against Perpetuities* (3d ed. 1915), secs. 329, 330, 603a.

²³ 36 *Yale L. Jour.* 1180.

able annotation in the reports. The case of *Fountain Park Co. v. Hensler* involved a statute which authorized a chautauqua corporation to condemn certain land, which it proceeded to do. In his brief the defendant questioned the constitutionality of this statute. The plaintiff excepted to a rule sustaining the defendant's objection. *Held* on appeal that the exception be overruled upon the ground, inter alia, that since the statute authorized the condemnation of property for other than a public use it was unconstitutional.²⁴

It is said generally, as in the instant case, that private property cannot be condemned for a private purpose. An analysis of the decided cases, however, makes the matter much less simple than this general statement would indicate. There are a number of instances in which privately owned land has been condemned for what at least appeared to be private purposes. Thus a right-of-way was condemned to permit the development of privately owned mines,²⁵ and, in another case, a similar right-of-way was condemned to reach inaccessible privately owned timber lands.²⁶ In other cases the court has allowed condemnation of a right-of-way of private railway facilities for a remotely situated factory²⁷ as well as the condemnation of property to allow the construction of irrigation ditches for the improvement of private lands.²⁸ On the other hand, a private college and a private cemetery corporation have been forbidden similar privileges.²⁹ A synthesis of the cases would seem to indicate that the condemnation of land for private purposes has been allowed only where the economic development of communities seemed to require it, under the then present conditions. The current Indiana case in denying the right of condemnation for

²⁴ *Fountain Park Co. v. Hensler*, 155 N. E. 465 (Ind. 1927). The case of *Kessler v. City of Indianapolis*, 157 N. E. 547 (1927), is also reported and extensively annotated in 53 A. L. R. I.

²⁵ *Strickley v. Mining Co.*, 200 U. S. 527, 26 Sup. Ct. 301 (1906); *Monetaire Mining Co. v. Columbus Mines*, 53 Utah 413, 174 Pac. 172 (1918). *Contra*: *Inspiration Copper Co. v. New Keystone Copper Co.*, 16 Ariz. 257, 144 Pac. 277 (1914).

²⁶ *Mountain Timber Co. v. Court*, 77 Wash. 585, 137 Pac. 994 (1914). *Contra*: *Anderson v. Logging Co.*, 71 Or. 276, 139 Pac. 736 (1914).

²⁷ *Armstrong v. Illinois Cent. Ry.*, 282 S. W. 382 (Tenn. 1926); *Cottrell v. Chicago Ry.*, 192 Ind. 692, 138 N. E. 504 (1923). *Contra*: *Limits Industrial Co. v. Pipe Works*, 321 Ill. 101, 151 N. E. 567 (1926).

²⁸ *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 676 (1905); *Contra*: *Smith v. Cameron*, 106 Or. 1, 210 Pac. 716 (1922).

²⁹ *Connecticut College v. Calvert*, 86 Conn. 421, 88 Atl. 633 (1913); *Evergreen Cemetery Ass'n v. Beecher*, 53 Conn. 551, 5 Atl. 353 (1886).

private purpose seems to be in accord both with the prevailing decisions and the theory upon which they probably rest, since it could hardly be said that land for the use of a chatauqua corporation was incidental to the necessary economic development of the community.

LOVETT v. LOVETT.

In the case of *Lovett v. Lovett* the defendant had contracted to execute a will leaving all her property to the plaintiff. She also agreed not to revoke the will. The will was executed in accordance with the contract. Later the defendant repudiated her agreement and threatened to revoke the will. The plaintiff sued to enjoin her from breaking her contract and revoking the will. *Held*, that the injunction should issue enjoining the defendant from revoking the will in violation of the contract.³⁰

This case is discussed in the *Michigan*³¹ and *Pennsylvania*³² *Law Reviews*. A contract to bequeath or devise property if it has the requisites of a valid contract is not only enforceable in law but is also protected in equity. Hitherto there has not been specific enforcement of all contracts to make wills since it is held that there is no breach of the contract until death of the promisor.³³ Where the promisor has not breached his contract but has neglected to execute a will equity will not decree that he execute a specific will. But if the promisor has made a conveyance in violation of his contract to make a will to one not a *bona fide* purchaser for value, equity may set aside this conveyance, or decree that the grantee hold the property in trust subject to the provision of the contract.³⁴ It has already been held that if the promisor repudiates his contract and threatens to convey in violation of its terms, equity may enjoin him from thus conveying away the property. Under these facts the promisor holds the property in trust for himself for life with the remainder to the promisee in fee. The instant case in Indiana attempts the further remedy of enjoining the promisor from revoking his will in so far as that will is made in compliance with an enforceable contract. The main objection to this

³⁰ *Lovett v. Lovett*, 155 N. E. 528 and 157 N. E. 104 (Ind. 1927).

³¹ 26 *Mich. L. Jour.* 464. This case is also commented upon in 3 *Ind. L. Jour.* 242.

³² 76 *Pa. Law. Rev.* 110.

³³ *Maud v. Maud*, 33 O. S. 147.

³⁴ *Carmichael v. Carmichael*, 72 Mich. 76, 40 N. W. 173, 1 L. R. A. 596; *Duvale v. Duvale*, 54 N. J. Eq. 581, 35 Atl. 750 and 56 N. J. Eq. 375, 39 Atl. 687, 40 Atl. 440.

further remedy is that such revocation might occur in violation of the injunction and that it would probably be effective in spite of the injunction.³⁵ It may be answered, however, that the injunction is likely to be obeyed and that it gives some further protection to the contracting parties.

MATHEWS v. REX HEALTH AND ACCIDENT INS. CO.

This case involves an action on a life insurance policy. A physician employed by the hospital, at which the insured had been a patient, was permitted, over the objection of the plaintiff, to testify to information obtained in the course of an autopsy performed at the hospital, which was sufficient to avoid the policy. The physician was not a member of the hospital staff and had not treated or previously seen the patient. The admissibility of this evidence is affected by the statute, Burns' Ann. Stat. 1926, sec. 550, which provides that physicians are not competent witnesses "as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases." *Held*, that under this statute the physician was incompetent to testify as to information obtained at the autopsy, and the admission of such testimony was reversible error.³⁶

The *Minnesota Law Review*,³⁷ the *Columbia Law Review*³⁸ and the *Yale Law Journal*³⁹ comment upon this case. All of them reach the conclusion that the decision is not justified on the authorities, and that it is out of keeping with the sound development of the law of evidence. It is pointed out that in general any witness should be allowed to testify to any evidence of which he has knowledge unless it is excluded under some exception that is well founded in the law and seems to be necessary under our system of trial by court and jury, or unless it is excluded because of some privilege that, while personal to the witness, is well recognized in the authorities and is helpful in the administration of justice.⁴⁰ The privilege in this instance is

³⁵ Huston, *Enforcement of Decrease in Equity*, 22, 55; 43 A. L. R. 1024.

³⁶ *Mathews v. Rex Health and Accident Ins. Co.*, 157 N. E. 467 (Ind. 1927).

³⁷ 12 *Minn. L. Rev.* 242.

³⁸ 28 *Col. L. Rev.* 242.

³⁹ 37 *Yale L. Jour.* 122.

⁴⁰ "At common law there is no 'privilege' of physicians. The earliest intimation of anything of the sort appears to have been contained in a dictum of Justice Buller, in the old English case of *Wilson v. Rastall*, to the effect that:

given on the ground that patients in communicating with their physicians are likely to hide important information which would be necessary in ministering to their needs, if they think these facts may later be revealed in court. Thus the statute says that the physician shall not be required or permitted to testify as to those facts involving the patient's physical condition of which he learned through his professional employment. It seems to be agreed now that the actual justification of this rule in causing the patient to be more free in communicating with his physician is very doubtful.⁴¹ It is to be remembered that the patient rightly understands that a physician will not divulge anything he learns in his professional capacity under normal circumstances. Probably it is this general professional assurance of secrecy that gives the patient confidence in telling his physician of his physical condition. It is pointed out that the patient rarely knows of the physician's legal obligation not to divulge these facts in the course of a trial, and that his protection against such revelation at trial has no influence in causing the patient to trust his physician. On the other hand the general interests of justice seem to require that this privilege should not be granted. For instance, in the instant case, it was clear at trial that the hospital physician who performed the autopsy had secured evidence of the first importance in determining the rights of the claimants of an insurance policy. Unless some controlling public policy interfered, the disposition of claimant's rights under an insurance policy or in any other litigation should be determined in the light of all available evidence. The rule of privilege here enabled the plaintiff to recover in the insurance policy trial, although it is admitted that except for this rule there would have been ample evidence to prevent

'There are cases to which it is much to be lamented that the law of privilege is not extended; those in which medical persons are obliged to disclose information which they acquire by reason of their professional characters.'

This statement, although without effect upon the law of England, seems to have been instrumental in bringing about a statutory provision in the state of New York, which has been extensively adopted and followed, until similar provisions are now in force in slightly more than half of the states." (Footnote authorities in explanation of the above quotation are found on the same page.) 12 *Minn. L. Rev.* 391.

⁴¹ "Personally, we believe that the existence of any privilege at all is misguided sentimentality on the part of the legislatures in cases where a party voluntarily submits some question concerning his physical condition to a court." 5 Jones, *Commentaries on Evidence*, 2d ed., sec. 2189, p. 4171 at 4174.

recovery. The commentators take the view that the instant case is an unfortunately liberal construction of the Indiana statute, and that it is out of keeping with the interpretation of similar statutes in other states.⁴² This decision is considered to be unfortunate since it extends the privilege to cover evidence secured by hospital physicians under an autopsy; it is asserted that for the privilege to cover information thus obtained could not reasonably further the purpose behind the statute itself, since the patient would not keep the facts from his physician, if he knew that another physician in turn could later secure information through an autopsy.

RENFROW v. CITIZENS STATE BANK

The *Michigan Law Review*⁴³ comments upon the case of *Renfrow v. Citizens' State Bank of Stilesville*. It considers that the case involves two main points and concludes that the Indiana court has come to a sound and wise conclusion on both points. The case involved a defendant who promised to honor a draft on the plaintiff's customer for the purchase price of a car load of hogs and subsequently refused to pay due to the fact that the hogs were not in such condition as to comply with the terms of the contract of purchase. The court held that the defendant was not an acceptor and that he could set up the failure of consideration as a defence when sued on the plaintiff's draft.⁴⁴

On a case involving similar facts the New York court held that the guarantee bank was an acceptor but that it was not liable because the plaintiff payee, having failed to perform properly, was not in the position of one who in the words of the N. I. L. "receives the bill for value."⁴⁵ This case seems doubtful

⁴² "Thus it has been held recently that the result of an autopsy was not privileged because the information was not obtained for purposes of treatment. *Borosich v. Metropolitan Life Ins. Co.*, 191 Wis. 239, 210 N. W. 829 (1926); *Chadwick v. Beneficial Life Ins. Co.*, 54 Utah 443, 181 Pac. 448 (1919) (autopsy not privileged unless clearly only to supplement information acquired during previous treatment). Since most cases where the privilege is claimed are actions on insurance policies where deceased's misrepresentations as to health are involved or actions for corporal injuries where bodily condition is involved, the medical testimony would seem most highly probative. In such cases there would seem to be no reason for withholding facts except to conceal fraud." 37 *Yale L. Jour.* 122.

⁴³ 26 *Mich. L. Rev.* 567.

⁴⁴ *Renfrow v. Citizens State Bank of Stilesville*, 158 N. E. 919 (Ind. App. 1927).

⁴⁵ N. I. L., sec. 135 (in New York sec. 223). *Lemon Importing Co. v. Garfield Savings Bank*, 105 Misc. 627, 173 N. Y. Supp. 551.

since failure of consideration is generally not thought to be of consequence as between payee and acceptor.⁴⁶ Furthermore section 132, N. I. L., states "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer," and courts have held that a bill must be accepted by the drawee unless it is an acceptance for honor.⁴⁷ It is to be noted further that in spite of its decision the New York court did not hold that the bank was an acceptor for honor and the Indiana court reached the same conclusion. Since the bill was drawn on the purchaser, the defending bank could not occupy the status of an acceptor. If the bank was liable at all, such liability must be on a simple unilateral contract between it and the plaintiff. It seems reasonable to interpret that contract as subject to an implied condition that the hogs would be fit for the purpose contemplated by the buyer and seller and consequently to absolve the bank of liability where this implied condition was not met. On both grounds, therefore, the instant case seems sound.⁴⁸

SANCHEZ v. STATE

In this case the defendant at the trial had been prosecuted for murder in the first degree. The defense counsel, appointed by the state for the defendant, failed to subpoena witnesses for the defence, did not object to much incompetent testimony, at the trial, and permitted the use of an improper interpreter. On appeal from a conviction of murder in the first degree the court reversed the judgment on the ground that the incompetence of defendant's attorney justified reversal.⁴⁹

Normally the courts regard the incompetence of an attorney as imputable to the party who employs him and do not give any relief on that ground. Under the authorities it seems clear, however, that in extreme cases there may be relief.⁵⁰ Perhaps the paucity of cases on this point in the reports is due to the fact that when the trial court notices that a party has incom-

⁴⁶ *Bulliet v. Allegheny Trust Co.*, 284 Pac. 561, 569, 131 Atl. 471 (1925).

⁴⁷ *May v. Kelly and Frazier*, 27 Ala. 497 (1855); *Heenan v. Nash*, 8 Minn. 407 (Gil. 363) (1863).

⁴⁸ *Bank v. Stapleton*, 118 Kans. 755, 236 Pac. 828 (1925); *National City Bank v. National Bank of the Republic*, 300 Ill. 103, 132 N. E. 832 (1921).

⁴⁹ *Sanchez v. State*, 157 N. E. 1 (Ind. 1927).

⁵⁰ *State v. Jones*, 12 Mo. App. 93 (1882). Overruled by *State v. Dreber*, 137 Mo. 11, 23, 38 S. W. 567, 570 (1896). Cf. *People v. Blevins*, 25 Ill. 381, 96 N. E. 214 (1911).

petent counsel, especially in a criminal cause, the court will take an adjournment and arrange between the parties for adequate counsel. In this case the demand for relief seemed urgent since counsel for the defendant had been appointed by the state itself and no fault in selection could be attributed to the defendant. The commentator in the *Columbia Law Review*⁵¹ takes the view that the holding of the Indiana court is highly to be commended since it takes a non-technical view of the relief the appellate court may give in a case where a technical application of some fixed rule would be unfortunate. Clearly there must be some latitude of discretion in the appellate court under such circumstances.⁵² The need for relief in the instant case was urgent, because the action for damages against the incompetent attorney was inadequate; the defendant stood condemned to death; any relief to be effective had to go to the judgment of the trial court itself.

SMITH v. ZABEL

The commenter in the *Michigan Law Review*⁵³ disapproved the case of *Smith v. Zabel*, which involved a promissory note, otherwise negotiable, that contained the following provision: "No extension of the time of payment, with or without our knowledge . . . shall release us, or either of us, from the obligation of payment." The court held that this provision made the time of payment uncertain and thus rendered the instrument non-negotiable.⁵⁴

The majority of the cases have held that provisions in instruments, otherwise negotiable in form, relating to extension of time of payment do not destroy the negotiability of instruments.⁵⁵ The provisions in other cases, however, decided according to the majority rule, must be distinguished from the provision in the principal case; for in the principal case there is no express agreement or consent on the part of the makers that an extension of time of payment may be made, but merely an

⁵¹ 28 *Col. L. Rev.* 240.

⁵² *State v. Lewis*, 9 Mo. App. 321, 323 (1880).

⁵³ 26 *Mich. L. Rev.* 568. This case is also commented upon in 3 *Ind. L. Jour.* 397.

⁵⁴ *Smith v. Zabel*, 157 N. E. 551 (Ind. 1927).

⁵⁵ Chaffee's 4th ed. *On Brannan's Negotiable Instruments Law*, 870; *Woodbury v. Roberts*, 59 Iowa 348, 13 N. W. 312; *Annaheim Nat. Bank v. Dolph* (Cal. 1927), 255 Pac. 184; *Glidden v. Henry*, 104 Ind. 278, 1 N. E. 369. See also 21 *Mich. L. Rev.* 927 for analysis of these conflicting views.

agreement that if an extension be given, the obligation of the makers to pay would not thereby be released.⁵⁶ Hitherto no court holding that the usual extension of provisions renders the note non-negotiable has decided that this fact alone is sufficient basis for drawing a distinction between this provision and the usual extension provision. Where this provision has been before such courts they have either, as in the principal case, referred to their earlier cases where this provision was construed to mean the same as the usual extension provision or so construed it in the particular case before them. "However doubtful the conclusion of non-negotiability may be when there is an agreement to extend time, there would seem to be even more doubt as to the soundness of the like conclusion when the provision is in the form found in the principal case."⁵⁷

STATE v. BOWMAN

The *Yale Law Journal*⁵⁸ commentator disapproves the case of *State v. Bowman* on the ground that it can not be defended on the basis of recognized principles of statutory interpretation and on the ground that it reaches a most undesirable result. The *Bowman* case involved an Indiana statute which provided that the compensation for legislators in Indiana should be six dollars a day during the session. In 1925 an agreement was passed, to take effect January 1, 1929, by which "ten" dollars was substituted for "six" dollars in the original provision. The 1927 legislature passed an emergency act over the governor's veto making the compensation for that session ten dollars a day. In an action to compel payment, this statute was found unconstitutional by the trial court as violating the state constitution, Ind. Const., Art. 4, sec. 29 (forbidding an increase of compensation to take effect during the session at which it was made.) *Held*, on appeal, (two judges dissenting) that the judgment be reversed on the ground that the Amendment of 1925 by implication repealed upon its publication the former statute, and that since there was no provision for compensation for the 1927 legislature, the act was valid.⁵⁹

⁵⁶ *Oyler v. McMurray*, 7 Ind. App. 645, 34 N. E. 1004; *Evans v. Odem*, 30 Ind. App. 207, 65 N. E. 755; *Rosville State Bank v. Heslet*, 84 Kans. 315, 113 Pac. 1052.

⁵⁷ 26 *Mich. L. Rev.* 569.

⁵⁸ 37 *Yale L. Jour.* 127. This case is also commented upon in 3 *Ind. L. Jour.* 330.

⁵⁹ *State v. Bowman*, 156 N. E. 394 (Ind. 1927).

If the Emergency Act of 1927, as an independent statute, was intended to repeal in part the 1925 statute, its repealing effect would not operate until its own provisions went into effect.⁶⁰ This repeal could be either express or implied. Or the amendment might have expressly provided that the old statute remain in effect. But the failure to use either method was held in the instant case to indicate a legislative intent that the repeal take immediate effect. Nevertheless, as suggested in the dissenting opinion, the amendment of 1925 by fixing the time of increase would seem clearly to manifest an intent to preserve the old law until the time indicated for the beginning of the increase.⁶¹ The Indiana court cites the proposition that such portions of an act as are replaced by an amendment are thereby abrogated. But the question here involved is the time of such abrogation. The general rule is that an amended statute is construed as if the amendment had been enacted in the original,⁶² but this rule like many other rules, in statutory construction, is considered to be for the purpose of interpreting the intent of legislature.⁶³ And it has been forcefully urged that in cases of genuine ambiguity the court should interpret the statute so as to reach a desirable result rather than to try to determine the "supposed legislative intent."⁶⁴ The Yale commentator submits that it is undesirable to permit a legislature to increase its own salary and that the instant case might properly have prevented this result. It is urged further that the decision is wrong as a matter of strict construction since an amendment does not repeal an inconsistent statute until the time fixed for its taking effect. Accordingly, if the legislature postpones the time of taking effect of the amendment, the repeal should likewise be delayed in the absence of express provision to the contrary.⁶⁵

⁶⁰ *Leymer v. State*, 8 Ind. 490 (1856); *State v. Paul*, 83, 151 Pac. 114 (1915); 1 Sutherland, *Statutory Construction* (Lewis ed. 1904), sec. 246.

⁶¹ *McDowell v. Warden of Mich. Reformatory*, 169 Mich. 332, 135 N. W. 265 (1912).

⁶² *Drew v. Tift*, 79 Minn. 175, 81 N. W. 839 (1900); Sutherland, *Statutory Construction* (Lewis ed. 1904), sec. 237.

⁶³ *Blake v. Board of Education*, 112 Kan. 266, 210 Pac. 351 (1922).

⁶⁴ Sutherland, *Statutory Construction* (Lewis ed. 1904), sec. 364. Freund, *Interpretation of Statutes*, 65 U. of Pa. L. Rev. 207, 231 (1917).

⁶⁵ *Spaulding v. Alford*, 1 Pick. 33 (Mass. 1822).

STATE EX REL. SCHROEDER v. MORRIS.

The *Harvard Law Review*⁶⁶ comments on the case of *State ex rel. Schroeder v. Morris* and comes to the conclusion that this case distinctly limits the Indiana doctrine which had been enunciated by the Supreme Court in the past. The commentator takes the view that this general Indiana doctrine is in conflict with a majority of the decisions in other states, and that the instant case is much to be commended in so far as it limits the applicability of the doctrine in Indiana and will tend to restrict its extension in other states. The instant case involves some citizens of New Albany who brought a mandamus proceeding against the mayor and the city council of that city to compel them to comply with a state statute. The statute provided that the fire departments of all cities having a population of over 14,000 (which included New Albany) should be divided into two platoons, one to perform day service and the other night service. The mayor and city council demurred. Judgment was given for the plaintiff and the defendant appealed. *Held*, that the statute did not interfere with the right of municipalities to local self-government.⁶⁷

"The doctrine that even in the absence of express constitutional limitations, there are restrictions upon the power of the legislature to interfere in the local affairs of municipalities, originated in a dictum of Judge Cooley But the leading proponent of the doctrine has been the Supreme Court of Indiana."⁶⁸ In a leading case, the doctrine was applied by the Indiana court to invalidate a statute which appointed a board to take charge of a local fire department.⁶⁹ "The rule is based on the assumption that there was at the time of the framing of the Constitution a uniform practice of non-interference by the state legislature in purely local matters. The historical inaccuracy of this assumption has been exposed."⁷⁰ The de-

⁶⁶ 40 *Harv. L. Rev.* 1153.

⁶⁷ *State ex rel. Schroeder v. Morris*, 155 N. E. 198 (Ind. 1927).

⁶⁸ 40 *Harv. L. Rev.* 1153-1154. See also *People v. Hurlbert*, 24 Mich. 44 (1871); *State v. Denny*, 118 Ind. 449, 21 N. E. 274 (1888).

⁶⁹ *State v. Fox*, 158 Ind. 126, 63 N. E. 19 (1902).

⁷⁰ 40 *Harv. L. Rev.* 1154. McBain, *The Doctrine of an Inherent Right of Local Self Government*, 16 *Col. L. Rev.* 190 (1916). And this doctrine seems to have been repudiated in a majority of the states. *Booth v. McGuinness*, 78 N. J. L. 346, 75 Atl. 456 (1919). *Contra: State v. Barker*, 116 Iowa 96, 89 N. W. 204 (1902).

cision in the present case is merely that the regulation concerns a state-wide interest; the language of the decision, however, indicates a decided change in the attitude of the Indiana court, showing an intention to restrict the doctrine to the facts of adjudicated cases.

STATE v. SCHUMAKER

In this case the superintendent of the state Anti-Saloon League caused his annual report to be published in pamphlet form and distributed throughout the state. The report also appeared in the official publication of the League. In the course of his report the superintendent asserted that substantial justice had been defeated through the refusal of the state supreme court to allow the admission of illegally obtained evidence in several liquor cases which he named. He also called upon the electors to return a "dry" supreme court at the next elections, stating that at least one of the then sitting members was said to be bitterly hostile to prohibition. The attorney general of the state filed an information, alleging that the superintendent was guilty of an indirect contempt of court. *Held*, that he is guilty of contempt of court because the report in question is apt improperly to influence the court on a principle of law that will certainly be involved in future cases, by criticism of the reasoning of the court and by threats to defeat its members at the polls.⁷¹

This case has received critical comment in more legal periodicals than any other decision rendered by the Indiana courts during the current year. It has been approved by two law reviews, not for the reasons given in the decision itself, but because it is thought to be justified upon the facts according to some authorities in England and America. Of the six periodicals that have commented on the case, however, four disapprove it both in its result and in its reasoning. The *Illinois Law Review*⁷² approves the case on the ground that any criticism of a court in so far as this relates to its official functions may be punished as contemptuous, if it is found that that criticism is calculated to degrade the court in the public mind and hence to interfere with the administration of justice.⁷³ The *Illinois Law*

⁷¹ *State v. Shumaker*, 157 N. E. 769 (Ind. 1927).

⁷² 22 *Ill. L. Rev.* 768. This case is also commented upon in 3 *Ind. L. Jour.* 149.

⁷³ *In re Dill*, 32 Kan. 668, 5 Pac. 39, 49 Am. St. Rep. 505; *Wyatt v. People*, 79 Colo. 252, 26 Pac. 961; *Watson v. Williams*, 36 Mass. 331.

Review states that this is not only the old English rule on contempt but that an analysis of the decided cases shows it to be, at least inferentially, the majority rule at the present time in America.⁷⁴ Four of the other periodical comments state that this is not the majority rule at present and this conclusion is supported by two writers on the subject.⁷⁵ It will be noted that even under the view of the *Illinois Law Review* it is never contemptuous to comment on decisions of a court by way of professional criticism dealing with the validity of the decisions as a question of law. The *Illinois Law Review* points out that it is not considered proper for a court to defend itself against popular attacks either in its opinions or in public comments; hence it is urged that it is both improper and unfair for critics of the court to publish their criticisms when those criticisms are of such a nature as to reflect upon the honor of individual members or the impartiality of the court itself.⁷⁶ The *St. Johns Law Review*⁷⁷ takes much the same position but without so full a discussion. It is said in both comments that one of the decided cases involved in the *Shumacher* case was before the court on petition for rehearing at the time of the alleged contemptuous criticism. On this technical ground the decision in the *Shumacher* case would be reconcilable with the majority decisions which hold that if a case is pending before the court and the criticism of the judge or the court is of such a nature as to interfere with the administration of justice, then the writer or publisher of the criticism may be punished for contempt.⁷⁸

The *Pennsylvania*,⁷⁹ *Michigan*,⁸⁰ *Texas*⁸¹ and *Harvard Law Reviews*⁸² take the view that the decision is in conflict with the former position of the Indiana court on the same subject and that it is contrary to the great weight of authority in America

⁷⁴ "Where a motive of the court is impugned, the cause generally hold that it is immaterial that the question had been disposed of at the time of the act or words." 22 *Ill. L. Rev.* 769.

⁷⁵ Beale, *Contempt of Court, Criminal and Civil*, 21 *Harv. L. Rev.* 161, 163 (1908); Willis, *Punishment for Contempt of Court*, 2 *Ind. L. Jour.* 309 (1927).

⁷⁶ Albertsworth, *Contempt of Court in Commenting upon Literary Style of Judge*, 20 *Ill. L. Rev.* 190-2.

⁷⁷ 2 *St. Johns L. Rev.* 88.

⁷⁸ Beale, *Contempt of Court, Criminal and Civil*, 21 *Harv. L. Rev.* 161, 163 (1908).

⁷⁹ 76 *Pa. L. Rev.* 210.

⁸⁰ 26 *Mich. L. Rev.* 440.

⁸¹ 6 *Tex. L. Rev.* 388.

⁸² 41 *Harv. L. Rev.* 255.

today.⁸³ They state that its result is most unfortunate. They seem to admit that the case might be upheld in so far as it involved a criticism of a case then pending before the court on petition for rehearing, but they imply that this basis would be highly technical and they do not discuss it inasmuch as the court itself does not discuss it or base its decision upon it. The commentators disapprove the decision, stating that "the Indiana court's assertion that criticism of decided cases might tend to influence timid judges in deciding like cases is as well founded in fact as that the criticism might influence the judge in disposing of a pending case. But the desirability of free comment and discussion by the public on the decisions of appellate courts, which form a large part of the law, is much greater than in the instance of pending cases. It is generally thought that decided cases may be discussed, and the court criticized or censured for its decision, as any official act may be. The judge has the same protection, by both criminal and civil process, that any citizen or official has. At best, that a person should sit in judgment, and sometimes act also as prosecutor and witness, in a case in which he is the aggrieved party, is an anomalous situation. The reasons given for this practice, a survival of the crime of *lese majesty*, that it tends to preserve respect for the courts, and that the criticism might influence the court favorably to the side of the person criticising, are equally ironical."⁸⁴

WALLACE V. STATE

The *Columbia Law Review*⁸⁵ commentator discusses the case of *Wallace v. State* and concludes that its holding is not in keeping with present authorities and that its result is not desirable. In this case a search warrant was issued on an officer's affidavit that he "has reason to believe and does believe" that the defendant possessed intoxicating liquor and implements in violation of the state prohibition law. The defendant was indicted, liquor and distilling apparatus having been seized under the warrant. The Indiana statute regulating the issuance of warrants pro-

⁸³ "Such seems to have been the law in Indiana prior to the decision of the principal case." 41 *Harv. L. Rev.* 255. *Cheadle v. State*, 110 Ind. 301, 11 N. E. 426 (1887); *Zuber v. State*, 188 Ind. 60, 121 N. E. 828 (1919). See also Willis, *Punishment for Contempt of Court*, 2 *Ind. L. Jour.* 309, 314 (1927).

⁸⁴ 6 *Tex. L. Rev.* 388-89.

⁸⁵ 28 *Col. L. Rev.* 103. This case also is commented on in 3 *Ind. L. Jour.* 151.

vided that if any person should make an affidavit that he had reason to believe and did believe liquor was being kept in violation of the law, a warrant should issue. On appeal from an order of the lower court overruling the defendant's motion to quash the search warrant and the affidavit, and to suppress the evidence seized, *held*, judgment reversed.⁸⁶

The court stated a search warrant, based solely upon an affidavit of information and belief, was invalid and the search under it unlawful. The affiant must make a satisfactory showing of facts constituting probable cause to the magistrate employed to issue the warrant. By virtue of the Fourth amendment and similar provisions in state constitutions, warrants may not issue except upon probable cause, supported by oath or affirmation.⁸⁷ "Under specific statutes in most states, the magistrate, before issuing the warrant, is expressly required to examine the grounds of the application and have the facts, on which such charge is based, set forth in the affidavit. But under statutes like the one in the instant case, it would seem that a warrant may be issued based solely on an affidavit of information and belief without the requirement that a showing of facts be made from which the magistrate could draw an inference of probable cause."⁸⁸ The opinion in the instant case, however, held that the statute simply did not state all the requisites with which issuance of warrants must comply and that if it did purport to do so such a statute should be declared unconstitutional. "It is difficult to see why the statute should be declared unconstitutional, because in any event, whether or not the affiants' declaration that he 'has reason to believe and does believe' is regarded as tantamount to a declaration that he has probable cause to believe, the search warrant can be quashed if probable cause did not exist at the time of issue."⁸⁹ In addition, the judgments of magistrates on probable cause are notoriously uncertain, and their judicial function of issuing warrants might well be limited, especially because some jurisdictions hold that a magistrate's finding of probable cause is conclusive. "The

⁸⁶ *Wallace v. State*, 157 N. E. 657 (Ind. 1927).

⁸⁷ Frankel, *Concerning Searches and Seizures*. 34 *Harv. L. Rev.* 361 (1921).

⁸⁸ 28 *Col. L. Rev.* 104. In such cases as the one set forth in the text it may be a mere fiction to hold that a finding of probable cause can be inferred from the fact that the magistrate issued the warrant. *Frihart v. State*, 189 Wisc. 622, 208 N. W. 459 (1926); *City of Jackson v. Howard*, 135 Miss. 102, 99 So. 497 (1924).

⁸⁹ 28 *Col. L. Rev.* 104.

instant case probably represents the most desirable rule provided it does not preclude the issuance of warrants on hearsay evidence, when such evidence constitutes probable cause."⁹⁰

WOLF HOTEL CO. V. PARKER

The *Michigan Law Review*⁹¹ comments favorably upon the case of *Wolf Hotel Company v. Parker* both on the ground that the case is in accord with the majority rule at the present time and on the ground that it reaches a good result. In this instance the plaintiff was a guest in the defendant's hotel. The defendant stored the plaintiff's trunk in the basement, where water, backed from the sewer after an unusual rainfall, damaged clothing in the trunk. The lower court instructed the jury that if the defendant knew or should have known the basement flooded after heavy rainfall and had not taken precaution to prevent flooding of the basement by ordinary rains, and if such precautions would have prevented the flooding which caused the damage, the fact that there was an unusual rainfall was no defense. *Held*, there was no error in these instructions.⁹²

An independent intervening agency may break up the casual connection between the defendant's breach of duty to the plaintiff and the injury, and relieve the defendant from liability.⁹³ "The intervening agency, however, must so supersede the operation of the defendant's negligence that the intervening cause, without defendant's negligence contributing thereto, produced the damage."⁹⁴ If the intervening agency merely accelerates the original cause, which of itself was sufficient to produce the injury, the primal wrongful act is still the proximate cause. The decision in the instant case is in accord with these principles. The intervening *Act of God* was unusual, but the wrongful act in allowing the basement to be in such condition that ordinary rainfall would have caused the damage was sufficient to fix liability in law.⁹⁵

⁹⁰ 28 *Col. L. Rev.* 105.

⁹¹ 26 *Mich. L. Rev.* 704.

⁹² *Wolf Hotel Co. v. Parker*, 158 N. E. 294 (Ind. 1927).

⁹³ *Pullman Palace Car Co. v. Loack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; I Shearman and Redfield, *Negligence*, 6th ed., sec. 32 et seq.

⁹⁴ 26 *Mich. L. Rev.* 704. *Baltimore, etc., Rd. Co. v. Sulphur Springs School District*, 96 Pa. St. 65; I Thompson, *Negligence*, 2nd. ed., sec. 73.

⁹⁵ *Ulrich v. Dakota Loan and Trust Co.*, 3 S. D. 44; Beale, *Proximate Consequences of an Act*, 33 *Harv. L. Rev.* 633; Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 *Harv. L. Rev.* 103, 223, 303.

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